DOCUMENT RESUME

ED 257 352 HE 018 381

AUTHOR Cote, Lawrence S.; And Others
TITLE Liability and Risk Management for Continuing Education Professionals.
PUB DATE Apr 85
NOTE 31p.; Paper presented at the Annual Meeting of the National University Continuing Education Association (Louisville, KY, April 14-17, 1985).
PUB TYPE Speeches/Conference Papers (150) -- Reference Materials - Vocabularies/Classifications/Dictionaries (134)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *College Faculty; Compliance (Legal); Constitutional Law; *Continuing Education; *Court Litigation; *Educational Malpractice; Glossaries; Higher Education; *Legal Responsibility; School Law; Student Rights; *Torts

ABSTRACT

Areas of liability that relate to the daily practice of continuing education professionals are summarized. Areas of the law with the greatest potential for litigation involving the institution and its employees are identified, along with 16 preventive measures that protect the educational practitioner and institution from frivolous litigation yet protect clients and academic institutions. The nature or degree of risk is defined in law partially by the legal status of the institution (public or private) and the individual's personal liability (whether an act was committed as an authorized agent of the school or whether the individual is entitled to immunity). Three generic sources of liability are addressed: tort and contract liability, criminal liability, and liability that results from violation of constitutional rights (or protections) or statutory and regulatory laws. Specific topics include negligence, defamation, fraudulent misrepresentation, civil rights, and consultants' activities. It is concluded that knowledge of the consequences of negligent acts and violations of statutory protections, coupled with a formal program of risk management, can assist continuing education professionals. Appended are a glossary of legal terms and concepts and a list of selected cases and references. (SW)

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Liability and Risk Management
For
Continuing Education Professionals

Lawrence S. Cote, Ed.D
Center Director (Acting)

James K. McAfee, Ph.D.
Assistant Professor, Special Education

The Pennsylvania State University
King of Prussia Center for Graduate Studies
and Continuing Education

With special assistance from
Jan H. Gabin, J.D.
Associate Director of Legal Management
University of Medicine and Dentistry of New Jersey

A Paper Presented at the Annual Meeting of the
National University Continuing Education Association
Louisville, KY, April 14 to 17, 1985

HE017391

Running Head: Liability and Risk Management

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Liability and Risk Management

For

Continuing Education Professionals

The largest postsecondary academic institutions provide the entire spectrum of human and material services. As full-service social institutions, colleges and universities and their employees are large targets for litigation. Such litigation arises almost naturally as a result of the complexity and volume of the human and related business interactions which occur in performance of the institutions' teaching, research and service missions.

Increasing Liability Through Expanded Service

The limits of institutional liability were forever breached when continuing education became a central mission for colleges and universities. Legal liability and exposure to risk are unfortunately extended and complicated by virtually every real effort an institution may make to expand its utility to the larger social and economic world.

University sponsored continuing education now occurs in formats, at times, in locations and with support mechanisms that represent fundamental changes in collegiate operations.

Part-time and full time faculty teach a bewildering array of "courses" for adult learners of every description in "classrooms" scattered widely throughout our nation. Although many of these courses are conducted in university-owned facilities, many more are offered in places and under conditions more convenient to the learner: in corporate training rooms, shopping malls, public and private schools, airfields, and firehalls. As colleges and universities continue to reflect a genuine commitment to the lifelong educational needs of their clients, they increase dramatically their exposure to liability and their need to assess and manage risk.

Although many higher education administrations have become increasingly aware of the institution's (and their personal) vulnerability under the law, there is little evidence that most administrators and faculty responsible for continuing education programs are more than casually aware of the legal responsibilities and liabilities connected with their employment. These professionals live and work in a litigious society and serve mature clients aware of their rights and privileges under the law. To what extent are faculty and administrators liable for their torts which may include defamation, negligence and educational malpractice? (Refer to Glossary for definitions of underlined terms and phrases.)

When administrators act as "officials" of their institutions, in advertising courses and "authorizing" faculty to provide instruction and "supervise" learners, are they assuming a duty to conform to a standard of care? What does it mean in the eyes of the courts to act as a reasonable man or woman? Are they subject to claims of breach of contract if program graduates are unsatisfied with what was delivered versus what was promised--often in writing--or if a program is terminated when some students have yet to complete it? Are such claims brought before the courts? Are faculty and administrators held financially responsible for damages awarded by the court or are they protected by the employing institution?

Paper Objectives

A brief conversation with a skilled college or university attorney will reveal quickly to the legally naive continuing educator the complexity and conditional nature of the law. Circumstances which surround alleged negligent acts or breaches of contract, for example, have a direct bearing on the standing of that claim in court but do so in a seemingly endless range of ways, each requiring different interpretation.

This paper will attempt to provide an overview of areas of liability as they may relate to the continuing education professional. The general objective is to disseminate information and increase awareness of the law pertinent to the daily practice of continuing education professionals.

Specifically, the paper will:

(a) discuss in an overview fashion those areas of the law with the greatest potential for litigation involving the institution and its employees;

(b) highlight areas of the law which may be the focus of increased actions against universities;

(c) suggest preventive measures which may protect the educational practitioner and institution from frivolous litigation yet provide clients and academic institutions with the protection under the law to which they are entitled;

(d) provide a glossary of legal terms and concepts important to a practical understanding of the law and its implications;

(e) provide a selected table of cases and references for more detailed consideration of the topic.

Areas of Liability

Since the early sixties, the risk of financial liability for injury to another party has increased dramatically for postsecondary institutions, their governing board members, senior officers and other personnel (Kaplin, 1980). But the nature or degree of that risk is defined in law partially by the legal status of the institution (public or private--not always a clear distinction) and the individual's personal liability (whether an act was committed as an authorized agent

of the institution and whether the individual is entitled to a form of immunity).

Private Versus Public Institutions

Public institutions generally enjoy some immunities and defenses not accorded to private institutions, such as protection under the doctrine of sovereign immunity, a defense still available in a few states. On the other hand, public institutions are generally held to higher levels of performance in providing constitutional protections. In some cases a claim of immunity might simply shift liability from administrators and trustees acting in official capacities in public institutions to those persons acting as individuals (Aiken, Adams & Hall, 1976; Hendrickson & Mangum, 1977). "A precise definition of the legal identity of the institution is pivotal to an accurate assessment of the types of legal liability to which it, and therefore its members, are potentially exposed" (Aiken et al., 1976, p. 161).

Personal Versus Institutional Liability

High financial awards to successful plaintiffs in civil suits not particularly associated with higher education may be casually noted by educational professionals. Most of these educators have never considered seriously paying the high premiums of professional liability insurance policies. But educational practitioners must be aware that personal liability for damages due to negligent actions does occur (usually where

the individual is directly involved--not merely in a chain of command--and the action was beyond the person's range of employment).

As is discussed later in more detail, institutions tend to indemnify employees from financially catastrophic damage awards when such employees are discharging given responsibilities in "good faith." Most continuing education professionals would heartily agree with the point of view that

> ...it is simply intolerable, and inevitably antithetical to the essential purposes and objectives of higher education, that individuals who are called upon to make discreet judgmental decisions on behalf of the institutions they serve be forced to risk personal loss or retribution when, in good faith, they perform their responsibilities (Aiken et al., 1976, p. 298).

Selected Areas of Liability

There are three generic sources of liability: civil liability--which includes tort and contract liability, criminal liability, and liability which results from violation of constitutional rights (or protections) or statutory and regulatory laws (Aiken et al., 1976; Henrickson & Mangum, 1977; Rapp, 1984). Criminal liability is the obligation that results from committing a crime. Although criminal acts certainly occur in circumstances connected with academe, it is not a

major focus of litigation for continuing educators.

Tort and contract law, as major sources of potential liability, will be the primary areas discussed. Civil rights and statutory violations will be examined briefly as will two general 'situations' in which risk exists for today's adult education professional: consultancies and employment of part-time faculty.

Tort liability. Tort is generally understood to refer to a private civil wrong involving natural human relationships independent of a contract. Tortious acts may be either intentional or unintentional. Such acts may include invasion of privacy, deliberate misrepresentation to deceive another person (such as asserting a program prepares enrollees for a certain licensing exam when it, in fact, does not); infliction of emotional distress; or injury caused to another due to other negligent acts or failures to act.

A type of tort that occurs when improper care is taken which results in harm or injury to another which is forseeable is known as negligence. Such injury may be to a person, to property, or to reputation. To prove negligence, an injured party must be able to demonstrate: (1) the defendant owed the injured party a duty of care; (2) there was lack of care; (3) an injury was suffered; and (4) the injury was caused by the lack of care (Hollander in Hobbs, 1982). In some instances liability is absolute, regardless of negligence. In such cases

there is no standard of care, only proper performance.

The lack of campus maintenance (or learning site maintenance if off-campus) can be a source of liability through negligence to the institution and its representatives. The so-called slip and fall cases which result in injury which could have been foreseen and possibly prevented are included in this category. (See table of cases: Poulin v. Colby College, 1979). If an injury occurs in a "classroom" not owned by the institution, depending on the circumstances and nature of the lease, if any, the institution could share liability.

A number of institutions and institutional representatives have been held liable by the courts, when administrators or faculty were judged to have failed to provide reasonable supervision. (See Amon v. State, 1979; Butler v. Louisiana State Board of Education, 1976). Although teaching which involves laboratories and athletic activities are particulary risk-prone, institution representatives have a duty to exercise "reasonable care" for their students' well-being in all situations where these employees represent the institution (Weeks, 1983).

Suits alleging the "novel--and troublesome--question" (Peter W. v. San Francisco Unified School District, 1976 in Patterson, 1980, p. 193) of educational malpractice, a new type of negligence tort, have begun to occur. In the few relatively recent cases adjudicated--all involving basic education to date

(Donahue v. Copiague Union Free School District, 1979; Hoffman v. Board of Education of the City of NY, 1979; Peter W., 1976), the courts have yet to recognize the standing of the claim of injury due to educational negligence (largely due to the inability of plaintiffs to establish a 'standard of care' or performance standards related to effective education). But the potential for such litigation is frightening if such a standard can be demonstrated successfully.

Such suits seek to redress students who have beer injured because of improper instruction or instructional oversight. The debate over whether further claims may be successful in the courts rages on both sides of the question: from those who believe the courts can and should recognize such claims to those who feel that the courts' historical reluctance to interfere with educational matters will prevail (Coilingsworth, 1982; Funston, 1981; Kelly & McCarthy, 1980). Clear (1983), in addressing the question of establishing a standard of care regarding teacher education programs, has suggested:

> ...the current refuge provided to teacher educators by the lack of performance standards may not be nearly as secure in the future. Research on teaching effectiveness throughout the decade of the 1970s contains the potential for bringing order into what, from a judical point of view, has been the non-justiciable chaos of teacher effectiveness

standards (p. 22).

Although presently liability for continuing education professionals in this area in quite limited, ominous potential of risk is latent in such claims. If the courts decide to recognize and apply such a standard in elementary and secondary education, its subsequent application to postsecondary education would be another issue. Although the courts continue to reject suits based on the cause of action, this "unrecognized tort" (Lehman, 1981) remains a complex and unresolved legal issue.

Defamation is a tort which results from negligent acts involving the publication of information that causes reputation injury to another. Faculty and administrators communicate much information about students as well as each other in the course of conducting the business of continuing education. Such information must be handled with care to ensure it is not communicated negligently thus exposing the institution and its representatives to increased risk. To prove a defamatory act, the communication must be essentially false, bring disgrace or ridicule, damage reputation, career or cause similar injury, and be intentional. (See the table of cases--Greenya v. George Washington University, 1975, for an example of how such a suit might arise.)

Another area of risk in tort law is fraudulent misrepresentation. This cause for action requires that the

negligent act be demonstrated to have been deliberate. Plantiffs have also been successful in claiming injury due to negligent misrepresentation where wrongful acts have not been intentional (e.g., a misprint in a brochure which causes harm).

Kelly and McCarthy (1980) have suggested misrepresentation might also offer a back-door approach to educational malpractice and an alternative to breach of contract suits for students seeking redress for "education" which was promised, but not delivered. As a negligent act, if misrepresentation could be properly presented (note Joyner v. Albert Merrill School District, 1978 in the table of cases) it would move malpractice into the intentional realm and avoid some of the courts' objections to date. (The dissenting judge in the Donahue case specifically left the door open for such a plea.)

Contract liability. Certainly there is a general understanding that the law recognizes an obligation of contracting parties to fulfill promises of verbal or written agreements. In addition to commercial contract liability, the so-called enrollment contract provides adult students with one possible avenue to seek redress for education services rendered incompletely which may, some fear, be increasingly viable (Jennings, 1980-81; Nordin, 1980-82). Essentially every publication and verbal statement originating with an institution or its representatives officer has potential for being considered contractual in nature. Such statements are

usually considered by the courts to be 'promises' given to students associated with their 'promise' of enrollment.

Although recent cases have expanded an institution's obligations in contract law, the general view among legal scholars seems to be that the courts' reluctance to interpose themselves upon academic judgments will largely continue in this area of law also (Aiken et al., 1976; Jennings; 1980-81; Nordin, 1980-82). Most legal scholars seem to believe that "the enrollment contract does not legally bind the institution to teach well or effectively, but only to make a decent, good faith effort to do so" (Aiken, et al.,p. 234). But the enrollment contract can be express or implied, the key phrase being "successful completion of the course of study will.... Students have usually won challenges to program terminations and to serious deterioration in the quality of academic programs" (Jennings, p. 195). Although many such cases occur, the vast majority do not reach the appellate level and thus are not published.

In general, personal contractual liability to employees turns on whether they were authorized to enter into contracts on behalf of the institution. When so authorized, institutions at least share, and in fact usually indemnify employees, in such cases where a breach may occur.

Civil rights and other statutory liability. Institutions and their employees are liable under a variety of

constitutional provisions and regulatory laws ranging from basic civil rights to nondiscrimination protections based on color, handicap, and a variety of other discriminatory criteria. Here, more than in almost any other area of liability, the status of the institution (public or private) and whether such institution is a "person" in the eyes of the law is critical to determining the extent of liability and whether employees may also be sued. In general, there is clearly potential for both institutional and personal liability as a result of violating civil rights or other statutory laws (Kaplin, 1980; Rapp, 1984). In fact, litigation in this area of the law is growing rapidly.

Consultancies. When consultancies are undertaken by faculty or administrators they present a situation in which liability can be attached to an institution as well as to the individual consultant.

> It is frequently impossible to divorce the institution entirely from liability exposures arising out of private consultancies undertaken by faculty. ...problems of greatest difficulty arise when faculty, especially part-time clinical faculty, regularly conduct an established private professional practice; and move clinical cases and problems rather informally from one arena to another (Aiken et al., 1976, p. 241).

Employment of part-time faculty. An area of rapidly

increasing liability for institutions which should be of particular concern to continuing education professionals relates to part-time faculty employment. The courts are only beginning to deal with the array of issues and potential causes for action associated with part-time faculty. "More than a quarter million part-time faculty are employed in American colleges and universities.... Policy issues regarding part-time faculty are clouded and complicated by problems with definitions and data" (Gappa, 1984).

Part-time faculty have many legal avenues to seek redress of grievances: breach of contract, constitutional law (fourteenth amendment due process clause--equal protection, property rights), and statutory rights. Generally, part-timers do not have a right to due process in the non-renewal of employment unless they can prove that they have property rights--which depends somewhat on institution policy, practice, and the nature of their contracts. (For representative litigation see the table of cases. Balen v. Peralta Junior College District, 1974; Board of Regents v. Roth, 1972; Peralta Federation of Teachers, Local 1603 AFT v. Peralta Community College District, 1975; Perry v. Sinderman, 1972). Such attempts to establish property rights are largely unsuccessful although workload (7 1/2 hours per week or more in Connecticut) can help part-timers establish such property rights in court (Leslie, Kellams, & Gunne, 1982; Gappa, 1984). In otner

questions of liability, part-timers can be viewed as essentially the same as full time faculty (i.e. in their ability to cause injury and thus place the institution and themselves at risk).

Preventive Measures

Potential for litigation can be reduced by managing risk and informing institution employees of their responsibilities and liabilities under the law. As Clear (1983) has observed:

> The best way for producers of goods and services to avoid the inconvenience and expense of litigation is to understand both how harm can arise from their acts, and how those acts will be tested to determine whether liability is to be attached to them in the event of litigation (p. 19).

Following are a variety of suggestions which may be helpful for continuing education professionals.

1. Kaplin (1978) and others have suggested development of a risk management program. Many larger institutions have such programs in place. Such programs include (a) risk avoidance and risk control (e.g., improving physical environment, maintaining centralized information to identify recurrent problems which might generate liability, modifying hazardous behavior or activities), (b) risk transfer (shifts the potential for financial loss through purchase of commercial

insurance or indemnification agreements), and (c) risk retention (most practical for many institutions: institution becomes self-insured thus maintains a separate bank account to pay appropriate claims).

2. Some institutions have established Board of Trustee policies which indemnify employees. Although, as noted, many institutions protect employees in this way, the nature of that protection is often not communicated. Board acknowledgement of such policies are at least good for morale.

3. For civil rights liability, Kaplin (1978) suggests making counsel available to employees for consultation, conducting training and disseminating information (because individuals acting as agents of the institution have only limited immunity in the law).

4. Maintain confidentiality (i.e., limited to those who 'need to know') regarding personnel and student evaluations, recommendations and decisions. Be sure such communication is factual, true and free of malice (i.e., knowledge of or reckless disregard of a falsity).

5. College or university counsel should review lease agreements for off-campus sites.

6. As an institution, consider hiring in-house counsel.

7. Be sure individuals given responsibility to serve as supervisors are trained properly and qualified, recognized safety procedures are followed, and facilities and equipment

are in proper condition. Supervision includes timely and appropriate medical attention to injured parties (Hollander, 1982).

8. The limits of authority of institution employees should be clearly delineated, periodically reviewed and included in job descriptions, board policies and other pertinent institution documents (Weeks, 1983).

9. Where criminal or other dangers are known to exist, take steps to warn of the danger and, if possible, reduce or remove it (Hollander, 1982).

10. Require that faculty and administrator consultancies, where possible, take place off institution property. Consider requiring indemnification agreements to protect the institution from negligence which occurs as a result of consultancies unrelated to employees' primary duties (Aiken et al., 1976).

11. Describe carefully the "results" of completing educational programs. Review all promotional and advertising material to ensure that it is accurate and factual.

12. Handle program terminations carefully. Make every effort to assist the few remaining students in the program to complete it (and document these attempts in writing).

13. If the quality of an educational program deteriorates, try to improve it or otherwise ameliorate "injury" to the student which may result.

14. Consider limiting part-time faculty to an

"appropriate" ceiling of contacts hours per week to avoid establishing a property right to their position (i.e., "appropriate" for your state, if any such a ceiling exists. As Gappa, 1984, noted, 7.5 contract hours per week is sufficient for inclusion in a bargaining unit in Connecticut).

15. Develop a formal classification system and pay scales for part-time faculty that recognize the differences among part-time faculty, full time faculty teaching part-time, and various groups of part-time faculty (or as Leslie et al., 1982, note, part-timers may have grounds to sue for equal protection thus equal pay). Recognize those differences in all policies and written documents.

16. Take care with regard to discussion of contract renewal with part-time faculty. If the language of the contract is explicit that it is temporary and short-term (assuming institutional practices and policies are in line also), the institution should be able to resist claims to establish a property right (Leslie & Head, 1979). As was noted by the court in Balen v. Peralta Junior College District, 1974, "the form letter dismissal with virtually automatic rehiring creates an expectancy of reemployment" (p. 595).

Conclusion

Litigation will surely increase in higher education. Continuing education professionals are faced with the disheartening irony that the institutions' risk and subsequent

liability--and their personal liability as well--are increased in direct proportion to the success of their programs and the broadening of institutional missions. As Morgenstern (1983) has stated, the best protection available "...is to act in good faith as a reasonable man would act under all the circumstances" (p. 35).

Absolute protection is impossible. But knowledge of the consequences of negligent acts and violations of statutory protections available to adult students and faculty--coupled with a formal program of risk management--can assist continuing education professionals prevent frivolous or unnecessary litigation yet provide clients and employees with the protection under the law to which they are entitled.

Glossary of Selected Terms and Concepts

Breach of Contract	Breach of binding legal arrangements between two or more contracting parties (enforceable by either party in case of the other's breach).
Defamation	A type of tort which results in injury to a person's reputation. If such false and malicious statements are spoken, it is considered slander; if written, libel.
Duty of Care/Standard of Care	Expectations for behavior which should be performed by a "reasonable man" (generally higher expectations than for a lay person if a case of "professional" negligence).
Educational Malpractice	A relatively new (as yet, unrecognized) tort which has the potential of extending negligence liability for faculty and administrators well beyond current accepted limits.

Indemnify	To protect or defend. Insurance is a form of indemnification as are "hold harmless clauses in contracts": "hold" another party "harmless" from financial liability. In colleges and universities, the university is usually the "indemnitor": protects individuals who are carrying out assigned duties and acting within the scope of their employment.
Negligence	Improper care that results in injury or harm that is foreseeable. This type of tort requires four conditions before it can be established: (a) a duty to conform to a standard care (conduct), (b) a failure to conform to that standard, (c) a harm is suffered that is legally compensable, (d) a causal relationship exists between the harm suffered and

the failure to conform.

Reasonable Man Doctrine — A test applied by the courts to determine negligence: could a reasonable person have foreseen such an occurance and prevented it? A reasonable man is generally considered to possess normal intelligence, physical attributes, perception, memory and special skills and knowledge associated with their particular vocation.

Sovereign Immunity — Also known as governmental immunity, means "the king can't be sued." It's a defense available to administrators (not faculty) of public institutions (although in many states it has been somewhat abrogated by legislatures).

Tort — A civil wrongdoing, other than breach of contract, for which courts will allow a damage remedy. Tort actions are brought to compensate individuals for harm to them caused by unreasonable actions of others.

Selected Table of Cases

Tort Liability

Personal injury

Amon v. State (1979). An appeals court held that the university was negligent when a student using a table saw in a scenery shop severed part of her fingers when the safety guard for the saw provided by the manufacturer was not in place. Negligence turned on the university's failure to ensure students using the saw were aware of the necessity of using the safety guard (i.e., improper supervision).

Butler v. Louisiana State Board of Education (1976). A professor was found negligent when a student fainted and damaged his teeth after the student's blood sample was taken in biology class.

Poulin v. Colby College (1979). A passenger in an automobile left his parked car to assist a college employee walk over ice and snow to reach a building where she worked. In returning to his car, he slipped and fell on ice. He sued the college for negligence. The court held that the college owed a duty of reasonable care under the circumstances to all persons lawfully on the land: injured party entitled to damages.

Educational malpractice

Donahue v. Copiague Union Free School District (1979). A high school graduate alleged failure of the school district to educate him properly. The New York court relied heavily on Peter, W., concluding the tort of educational malpractice was not recognizable in New York.

Hoffman v. Board of Education (1979). The same court which rejected the claim in Donahue decided Hoffman on the merits and gave a verdict to the plaintiff. N. Y. Court of Appeals reversed the decision.

Peter W. v. San Francisco Unified School District (1976). The courts acknowledged a "special relationship" between teacher and student but held that education is free of a "standard of care" due to the special nature of education. In this case, plaintiff claimed that as a result of the acts and omissions of the school officials, he had been deprived of an adequate education.

Defamation

Greenya v. George Washington University (1975). A part-time instructor alleged defamation because "Do not staff" was on an index card for him at the university scheduling office. Plaintiff lost: successful defense was "the conditional privilege of fair comment and

criticism."

Fraudulent misrepresentation

Joyner v. Albert Merrill School District (1979). Joyner alleged both fraud and breach of contract. The school was alleged to have misled the student about his aptitude for computer programming as well as the certainty of placement in a high paying job upon graduation. Student recovered $3,969 in damage but court rested its decision almost entirely on the finding of fraud.

Employment of Part-time Faculty

Balen v. Peralta Junior College District (1974). The California Supreme Court held for the part-time instructor, Balen, who argued that his length of service gave him statutory property rights to classification as a probationary employee.

Board of Regents v. Roth (1972) A complementary case to Perry, the Supreme Court warned that a person must have a legitimate claim of entitlement: "Part-time faculty must show that not renewing their contract resulted from violation of a constitutional right or must demonstrate a property right by statute, by contract, or by general institutional understanding" (Gappa, 1984, p. 41).

Peralta Federation of Teachers, Local 1603 AFT v.

Peralta Community college District (1975). This case was made possible by the Balen decision. The courts' decision here made it possible for part-time faculty to receive tenure in two or more school districts. Established the possibility of equal protection under the 14th amendment (thus a right to equal pay, equal privileges, etc.).

Perry v. Sinderman (1972). Supreme Court established that a series of short-term contracts, under certain conditions, establish a legitimate expectation of employment.

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